Appeal No. 2006AP1210 **Cir. Ct. No. 2004CV818**

WISCONSIN COURT OF APPEALS
DISTRICT IV

H&R BLOCK EASTERN ENTERPRISES, INC.,

PLAINTIFF-APPELLANT,

V.

MARY SWENSON, FRANCINE J. SHERBERT, TRACY A. HODSON, SALLY K. STELLOH, LYNETTE M. GUENTZ AND GERALD W. NIEDFELDT,

DEFENDANTS-RESPONDENTS.

FILED

May 31, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Higginbotham, JJ.

This appeal raises an important issue of first impression about the reasonableness of a covenant not to compete and a covenant not to solicit customers in a contract between an employer and employee. We certify the appeal to the Wisconsin Supreme Court under WIS. STAT. RULE 809.61 (2005-06),[1] for its review and determination.

The defendant-employees worked for H&R Block for a long time in the La Crosse area. They left H&R Block to start a tax preparation business. While employed with H&R Block, they entered into an agreement that precluded

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

them from soliciting or providing certain services to H&R Block customers for two years after termination of their employment with H&R Block, "such period to be extended by any period(s) of violation."

The validity of a restrictive covenant in an employment contract is controlled by WIS. STAT. § 103.465, which provides:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant … imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

To be enforceable, a restrictive covenant in an employment contract: (1) must be necessary for the employer's protection; (2) must provide a reasonable time period; (3) must cover a reasonable territory; (4) must not be unreasonable as to the employee; and (5) must not be unreasonable as to the general public. ***Chuck Wagon Catering, Inc. v. Raduege***, 88 Wis. 2d 740, 751, 277 N.W.2d 787 (1979). Reasonableness is a question of law to be determined by the court on the basis of the facts presented. ***Geocaris v. Surgical Consultants, Ltd.***, 100 Wis. 2d 387, 388, 302 N.W.2d 76 (Ct. App. 1981).

The issue we certify is whether the covenants are reasonable and valid with respect to their duration because they provide that the time period of the agreement will be "extended by any period(s) of violation." The circuit court

concluded that the agreement was invalid based on its duration.[2] H&R Block argues that the clause is reasonable as to duration because it increases the term of the restriction only by the number of days the clause is violated. Thus, a one-day violation leads to a one-day extension, and a one-week violation leads to a one-week extension. H&R Block contends the amount of time the defendants are restrained remains the same—two years—because the covenant changes the timing, not the length, of the restriction. H&R Block also contends the language does nothing more than incorporate into the contract the equitable remedy for breach otherwise available through the courts: tolling.

The case law from other states and the federal courts addresses the issues presented in this appeal in varied ways. For example, the employees point to Georgia cases that have invalidated similar provisions under Georgia law as indefinite. *See* ***Gynecologic Oncology, P.C. v. Weiser***, 443 S.E.2d 526, 528 (Ga. Ct. App. 1994) (a non-compete agreement that provided that "[a]ny violation of the restraint shall automatically toll and suspend the duration of this post-employment covenant for the amount of time that the violation continues" was invalidated by the court because the potential duration of the agreement was without limit); ***ALW Mktg. Corp. v. Hill***, 422 S.E.2d 9, 12-13 (Ga. Ct. App. 1992) (a restrictive covenant that provided that "[t]he running of the post-termination … period shall be tolled and suspended while [the employee] is in violation of this covenant" was invalidated by the court because its duration was "potentially

[2] The circuit court did not explain its decision in detail. It stated that the two-year period covered too lengthy a period of time and that the additional time provided for as a result of violations could substantially lengthen the period beyond two years. Our concern is focused on the clause extending the agreement in the event of violation, not on the two-year length of agreement.

limitless"). We note, however, that the reasoning in these cases is cursory. The cases thus are of limited analytic value.

H&R Block points, on the other hand, to decisions from the federal and other state courts where the court ordered that the time period called for in the non-compete agreement be imposed on the former employee as a *remedy* for a breach. *See* ***JAK Prods., Inc. v. Wiza***, 986 F. 2d 1080, 1090 (7th Cir. 1993) (extending non-compete covenant by period of violation); ***Overholt Crop Ins. Serv. Co. v. Travis***, 941 F.2d 1361, 1372 (8th Cir. 1991); ***Thermatool Corp. v. Borzym***, 575 N.W.2d 334, 337-38 (Mich. App. 1998). In these cases, however, the reasonableness of the duration of the covenant was not at issue, as it is here, because the restrictive covenant itself did not provide for an extension of the duration of its terms. Instead, the court imposed injunctive relief extending the contract as a remedy.

We believe this case is appropriate for certification because the issue has not yet been addressed in Wisconsin, cases from other jurisdictions are split, and resolution of the issue involves policy questions. The enforcement of the clause may be unfair because it might serve, in effect, to double the damages H&R Block receives—an extension of the non-compete agreement commensurate with the violation as well as damages for the time the employee does not comply. In other words, one of the possible implications of allowing tolling or extension clauses in restrictive covenants is that the employer's award of both an injunction and damages may be duplicative. On the other hand, it could be argued that awarding both an injunction and damages would not be duplicative because the monetary damages compensate for the employee's act violating the agreement,

while the extension of the non-compete agreement serves only to provide the employer what it bargained for in the first place.[3]

This case presents a second issue that may not warrant certification by itself, but that the supreme court may be interested in if it decides to consider the non-compete clause issue. The issue is whether intent is an element of an invasion of privacy claim brought under WIS. STAT. § 995.50(2)(b). That statute provides that a person is liable for damages for:

> The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

H&R block argues that intent is an element of the tort of invasion of privacy and it had no intent to use the names of their former employees to advertise and solicit business without their permission; it made a mistake when it did so. The employees argue that the tort of invasion of privacy requires only that their names be used for advertising purposes without their consent, which is what happened here.

For the above reasons, we conclude that this appeal is appropriate for decision by the supreme court.

[3] The defendants also challenge the covenants in several other respects that we do not discuss here because these issues can be resolved by existing law.